83-1139

No. 83-7096

In the Supreme Court of the United States.

DECEMBER TERM, 1983

TILLIE MOORE,
PETITIONER,

VS.

BUFFALO BOARD OF EDUCATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Tillie H. Moore
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Questions Presented

1. Whether death of petitioner before the conclusion of her appeal will vacate her complaint since she did not receive her full rights to the United States District of New York, nor the appellate court?

2. Whether ineffective assistance of trial counsel constitutes a ground for relief from a judgement or order of a United States District Court under Rule 60(b), Subsection 6, of the Federal Rules of Civil Procedure (U.S. Code, Title 28)?

3. Whether the United States Constitutional guarantees of procedural and substantive due process in the Fifth Amendment, forbidding deprivation by the Federal government of life, liberty or property without due process of law, dictate consideration of this factor when it is cited under Rule 60(b) (6) as the sole ground for a request for rehearing of a

plaintiff's adverse decision by the District Court which rendered that decision.

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IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1983

NO. 837096

TILLIE M. MOORE,
Petitioner,

V.

BUFFALO BOARD OF EDUCATION,
Defendant-Appellee
UNITED STATES OF AMERICA
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

Citations to Opinions Below

There are no reported opinions below. The brief per curiam opinions of the Court of Appeals dismissing Petitioner's appeal and denying her motion under Rule 60(b)(6) and Title 28 U.S.C. 1661 are duplicated as appendices to this petition.

Jurisdiction

On December 30, 1982 the United States District Court for the Western District of New York rendered an unreported decision in the case in chief, dismissing

Plaintiff-Appellant's request for relief from employment discrimination by Defendant-Appellee.

On March 3, 1983 the same Federal District Court rendered an unreported decision to Plaintiff pursuant to Plaintiff's request for relief, under Rule 60(b)(6) of the Federal Rules of Civil Procedure, from the initial determination.

On September 16, 1983 the Federal Second Circuit Court of Appeals affirmed, by informal decision, the Western New York District Court's previous action in the case.

The certiorari jurisdiction of this Court is invoked pursuant to 28 United States Code, Section 1254(1).

This Court is asked to decide an important issue of federal law which should, appropriately, be settled by it.

The judgement sought to be reviewed

hereby was both rendered and filed by the Federal Second Circuit Court of Appeals on September 16, 1983.

Questions Presented

1. Whether death of petitioner before the conclusion of her appeal will vacate her complaint since she did not receive her full rights to the United States District of New York, nor the appellate court?

2. Whether ineffective assistance of trial counsel constitutes a ground for relief from a judgement or order of a United States District Court under Rule 60(b), Subsection 6, of the Federal Rules of Civil Procedure (U.S. Code, Title 28)?

3. Whether the United States Constitutional guarantees of procedural and substantive due process in the Fifth Amendment, forbidding deprivation by the Federal government of life, liberty or

property without due process of law, dictate consideration of this factor when it is cited under Rule 60(b)(6) as the sole ground for a request for rehearing of a plaintiff's adverse decision by the District Court which rendered that decision.

Statutory Provisions

Amendment Five, United States Constitution states:

> No person shall...be deprived of life, liberty or property, without due process of law... .

Rule 60(b), Federal Rules of Civil Procedure, Title 28 United States Code states:

> (a) Clerical mistakes
> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be

so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from

> a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

Statement of the Case

During the summer or fall of 1976 Plaintiff-Petitioner, having during a previous period of time been a school cafeteria employee for Defendant-Respondent, a municipal board of education, was rehired by Defendant to work in its school cafeteria system. There is factual dispute regarding Plaintiff's new job title designation, Plaintiff asserting that she was promised a management training position, and Defendant alleging that she was to

return to her previous cafeteria laborer category. In the interim between Plaintiff's two periods of employment by Defendant she had attended a local community college and earned a degree in food service management sufficient to qualify her to apply for supervisory, rather than laboring, food service work.

On January 26, 1977 Plaintiff filed a discrimination complaint against Defendant with the New York State Division of Human Rights, based upon Defendant's failure to either promote Plaintiff or give her the necessary on-the-job training for promotion promised and intimated in Defendant's representations to her.

On March 2, 1977 Plaintiff filed the same accusation with the Equal Employment Opportunity Commission, charging as well an impending retaliatory lay-off by Defendant because she had complained of

discrimination to the state agency. While EEOC decided to rely upon the state agency for adjudication of the original basic allegation, it found reasonable cause to believe that Plaintiff had been unlawfully discriminated against in regard to the charge of retaliation, and instituted formal conciliatory attempts. These attempts fell through because Defendant would neither cooperate nor make concessions. The Justice Department consequently issued Plaintiff a 90-day "Right to Sue" letter. The state agency, meanwhile, issued a no probable cause decision, and Plaintiff, feeling that all available relevant evidence favorable to her had not been adduced, hired an attorney to sue in Federal District Court.

That attorney used Title VII and Section 1983 for jurisdiction of the District Court complaint, but was exces-

sively dilatory in proceeding, performed little or no investigation to substantiate the complaint, was lax in discovery techniques, made no effort to reach concurrence with Plaintiff as to evidence to be presented and relevant issues to be explored, refused to acknowledge or honor her views regarding case strategy, withheld from trial presentation material evidence of which Plaintiff advised him, misin- formed Plaintiff as to the import of his action and inaction, and generally pre- sented a poor case.

The District Court ultimately dimissed Plaintiff's complaint, and Plaintiff filed a Rule 60(b) pro se motion for relief from the judgement on the ground of counsel ineffectiveness, which motion was denied, and at the time of filing the motion also filed a pro se Notice of Appeal in the Federal Second Circuit appellate court.

The appellate court found against Plaintiff solely on the basis of the weight of the evidence produced at trial.

Simultaneous with application for writ of certiorari to this Honorable Court, Plaintiff has filed, through Mrs. Florence Thompson, the attorney who represented her in submission of a reply brief and in oral argument before the Court of Appeals, a petition for rehearing on the issues specified in Section (a) supra, asking for certification of the first of the two questions to this honorable body.

Reasons for Granting the Writ

For the following Federal Constitutional reasons I believe that a dearth of effective counsel representation, unforeseeable beforehand, and amounting to a deprivation of due and fair process, should constitute grounds for total or partial rehearing of this case under

Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Procedural Due Process

The "right" to, not "privilege" of, competent legal counsel in court litigation is entrenched in the American judicial system, not only in criminal cases by Constitutional mandate, but as well in civil cases by extensive historical tradition, and the recognition that some degree of actual ability is both required and expected is clear from tribunal rules regarding good standing and adequate moral character. When counsel improperly represents his client in court that client is effectively deprived of the opportunity to present witnesses or evidence to the decision maker, and of the opportunity to make an oral presentation to the decision maker, of the chance to confront and cross-examine witnesses or evidence to be

used against him, and, intrinsically, of his right to have an attorney present his case to the decision maker. All are elements of the adversary process which have been judicially recognized as being part of "due process". Inattentive and negligent counsel can turn a trial into a mockery or farce and deprive both the client and the tribunal of fundamental fairness. When the power of government is to be used in relation to an individual there is a right to a fair procedure in the determination of the basis for, and legality of, such action. When the possibility exists that someone's life, liberty or property is to be impaired, the government owes that person a fair process for the consideration of his interests.

CONCLUSION

For the reasons given a writ of certiorari should issue to review the judge-

ments dismissing and denying Petitioner's appeals, since she did not receive her full rights to the U.S. District Court of New York.

COPIES OF PREVIOUS FEDERAL DECISIONS UNDER SEPARATE COVER.

Respectfully submitted,

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83-1139

No. 83-7098

In the Supreme Court of the United States,

DECEMBER TERM, 1983

TILLIE MOORE,
PETITIONER,

VS.

BUFFALO BOARD OF EDUCATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

Appendix for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Please note:

This appendix contains the Judgement sought to be reviewed hereby was both rendered and filed by the Federal Second Circuit Court of Appeals on September 16, 1983.

Respectfully Submitted,

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Appendix

HONORABLE JOHN T. CURTIN
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
BUFFALO, NY

TILLIE MOORE,

Plaintiff,

-vs- CIV-80-424C

BUFFALO BOARD OF EDUCATION,

Defendant.

Filed March 3, 1983

No. 83-7096

Plaintiff Tillie Moore was hired by the Buffalo Board of Education on October 8, 1976. On January 26, 1977, she filed a complaint with the State Division of Human Rights, charging defendant with racially discriminatory employment practice. In this case, she alleges that she was dismissed on May 25, 1977, in retaliation for filing the January complaint. The court has jurisdiction of this case under 28 U.S.C. 1343; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e), et seq., as amended; 42 U.S.C. 1983.

Trial was held on August 13, 1982. Plaintiff testified as the only witness in her behalf. Edgar DeGasper, Director of Food Service for the defendant, and Ann McGurk both testified for the defendant. The parties had entered into a stipulation of facts (Docket Item 6) and, after trial, submitted post-trial briefs. The

court listened to summations from the attorneys for the respective parties, and the following constitutes the findings of fact and conclusions of law.

Plaintiff, a food service worker, had been previously employed by the Buffalo Board of Education [the Board] for several school years. She did not work during the summer months. On October 8, 1976, when it appeared that there might be an increase in the number of school lunches being served at the new food service facility at Public School #45, Mrs. Moore was rehired. At that time, Ann McGurk, who was the cafeteria manager there, had seven or eight food service helpers, of whom two were black (one of them the plaintiff). Mrs. Moore continued to work at School 45 for the remainder of 1976 and through 1977, until she was terminated in late May of 1977. As previously related,

she had filed a complaint with the State Division of Human Rights on January 26, 1977.

On May 25, 1977, Mr. DeGasper visited the cafeteria at Public School #45. He testified that he talked to the plaintiff as well as the cafeteria manager at that time and told plaintiff that this would be her last week at the school because the volume of the operation at the cafeteria had decreased to the point where her services were no longer needed. He testified that he did not use the word "fired" and further, based upon his years of experience on the Board, when someone's services are no longer needed at a particular school because of a drop in business, the policy of the Board is to put such a person back on a list for reassignment to another school when an opening develops.

Defense argued that Mrs. Moore in fact resigned. Defendant based this argument on the fact that on the following day, May 26, 1977, Mrs. Moore called Mrs. McGurk on the telephone and told her that she would not return. However, because of the stipulation of facts which was freely entered into by the defendant, the court will not accept the argument of the defendant and hereby finds that the employment of Tillie Moore was terminated on May 25, 1977 (see Docket Item 6, ¦22).

After May 25, 1977, Mr. DeGasper received inquiries from prospective employers of the plaintiff, and he gave her a favorable recommendation.

In order for plaintiff to establish a claim in this Title VII retaliation suit, plaintiff must show:

> first, protected participation or opposition under Title VII known by the alleged retaliator; second, an employment action or actions dis-

> advantaging persons engaged in protected activities; and third, a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse employment actions.

Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980). In the proceeding before the New York State Division of Human Rights, there was evidence that respondent's supervisors began to keep a constant and in-depth scrutiny of her performance shortly after she filed the complaint, and there was no evidence that a similar record was kept of other employees in the department. Yet, after listening to the testimony of the witnesses in the case and considering all the exhibits of record, I am unable to find any other connection between the filing of the complaint in January and the termination in May. See Ombu v. Children's Television Workshop, 516 F. Supp. 1055, 1059

(S.D.N.Y. 1981). Even giving the plaintiff the benefit of the doubt and finding that there is a prima facie link between the company and the termination, the court finds that the defendant has adequately explained the reason for the termination.

When Mr. DeGasper visited the school in late May of 1977, he found that the number of school lunches had continued to decrease from the high number of lunches in October 1976. For that reason, Mrs. Moore's services were no longer needed. In fact, the number of lunches declined further in June of 1977, when the school year ended.

The court accepts Mr. DeGasper's explanation. He has many years of experience with the Board, and it is his responsibility to attempt to run the food service in a manner fair to the employees but also as economically as possible. Plaintiff has

failed to show that this was a mere pretext. Of 21 employees terminated by the Board, 14 were terminated in May and June of that year. The court has also considered the fact that Mrs. Moore was hired at a new cafeteria center which did not have an established record of employment needs. Collectively, these facts are persuasive of defendant's position that Mrs. Moore was terminated for non-discriminatory reasons.

To sum up, the causal link between the filing of the complaint and the termination is weak at best, but giving the plaintiff the benefit of the doubt, the defendant has adequately explained the reason for the termination, and plaintiff has failed to show that the reason was pretext.

For these reasons, the complaint of plaintiff is dismissed, and the Clerk is

directed to enter judgment in favor of defendant dismissing the complaint without costs.

So ordered.

John T. Curtin
United States Distrct Judge

Dated: December 30, 1982

Appendix

HONORABLE JOHN T. CURTIN
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
BUFFALO, NY

TILLIE MOORE,

Plaintiff,

-vs- CIV-80-424C

BUFFALO BOARD OF EDUCATION,

Defendant.

---

*Filed March 3, 1983

No. 83-7096

After trial in August of 1982, the court filed a decision and order on December 30, 1982, dismissing plaintiff's complain. Judgment was entered on January 4, 1983.

During trial and post-trial briefing and argument, plaintiff was represented by counsel. After judgment was entered, she then relieved counsel and proceeded pro se. She filed a notice of appeal on January 28, 1983, and, at the same time, filed a motion pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, seeking to set aside the judgment.

By order of February 4, 1983, I set argument on the Rule 60(b)(6) motion for February 28, 1983. The defendant filed a letter reply on February 3, 1983. The court had argument on February 28. The plaintiff, appearing pro se, filed additional papers, Docket Items 20 and 21,

in support of her motion. At that time, I explained to the parties that because a notice of appeal was filed, there was doubt of my jurisdiction. Nevertheless, it appeared to be practical to hear the motion and make a tentative ruling.

At the hearing on February 28, Plaintiff was given the opportunity to make an oral statement in behalf of her position, and I gave leave to defense counsel to file a response if he desired on or before March 7, 1983.

Because of the scheduling order set down by the Court of Appeals, it appeared that a prompt decision should be made on Plaintiff's motion.

I have considered the arguments of Plaintiff carefully. If I have jurisdiction to rule on the motion, the motion is denied. Docket Items 20 and 21 and any written response made by defense counsel

shall be incorporated in the record on appeal.

So ordered.

John T. Curtin
United States District Judge

Dated: March 3, 1983

Appendix

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of September, one thousand nine hundred and eighty-three.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE THOMAS J. MESKILL,

HONORABLE LAWRENCE W. PIERCE,

Circuit Judges,

----------x

TILLIE MOORE,

Plaintiff-Appellant,

-against- 83-7096

BUFFALO BOARD OF EDUCATION,

Defendant-Appellee.

----------x

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Conclusion

I, petitioner Tillie M. Moore, was deprived of the court lever of the fundamental right of fair hearing due to inadequate counsel representatives. This issue was raised by post-trial motion under Rule 60 of the Federal Rules of Civil Procedure.

I am unemployed, a victim of discrimination.

For the reasons set forth above, I, Plaintiff-Appellant, respectfully request that a Writ of Certionarari issue to review the judgment of the United States District Court for the Western District of New York.

Prayer for Relief
Respectfully Submitted,

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No. 83-1139

IN THE

Supreme Court of the United States

October Term, 1983

TILLIE MOORE,

Petitioner

vs.

BUFFALO BOARD OF EDUCATION,

Respondent

On Appeal From the United States District Court for the Western District of New York

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Issue

Should this Court grant the Petition for a Writ of Certiorari, in order to consider whether the Fifth Amendment guarantees of procedural or substantive due process require that under Rule 60(b)(6) of the Federal Rules of Civil Procedure a District Court judge must consider claims of ineffective counsel as a ground for relief from a judgment.

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IN THE

Supreme Court of the United States

October Term, 1983

No. 83-1139

TILLIE MOORE,

Petitioner

vs.

BUFFALO BOARD OF EDUCATION,

Respondent

On Appeal From the United States District Court for the Western District of New York

---

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Summary of Argument

1. The questions presented lack the requisite public importance requiring immediately the grant of certiorari by this Court. (2) Federal District Courts and Circuit Courts of Appeal routinely consider, on motions for relief under Rule 60(b)(6) of the "Federal Rules of Civil Procedure", the consequences of inadequate counsel in the courts below the appellate level.

ARGUMENT

POINT ONE

The considerations governing review on certiorari to a Federal Court of Appeals before judgment state that the writ should be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate resolution in this Court. U.S. Sup.Ct. Rule 18, 28 U.S.C.

Petitioner seeks to invoke the jurisdiction of this Court to review a District Court's judgment denying relief from the initial trial judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Such judgment is appealable to the Court of Appeals under Rule 4(a) of the "Federal Rules of Appellate Procedure." *Browder v. Director of Corrections*, 434 US 257, 98 S.Ct. 556, 54 L. ed 2d 521, reh. denied 434 US 1089, 98 S.Ct. 1286, 55 L. ed 2d 795 (1978).

Petitioner has, simultaneously with filing the petition for certiorari with this Court, petitioned the Court of Appeals for the Second Circuit, by attorney, for a rehearing of the initial determination and for certifica-

tion of the same questions herein presented to this Court.

It is submitted that the instant case does not raise questions of sufficient public importance as distinguished from the interest of the plaintiff, nor does it present a case where there is a "real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.ed 897 (1954), citing, *Layne and Bowler Corp. v. Western Well Works Inc.,* 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.ed. 712 (1923). The petition is devoid of facts demonstrating such public importance and presents two questions that, in themselves and abstractly, may present an issue of substance. However, as this Court noted in *Rice,* supra, reasons justifying a grant of certiorari go "beyond the academic or the episodic". At p. 74.

Furthermore, this Court has previously considered the disadvantages of a grant certiorari before judgment of a Court of Appeals. In *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 937, 72 S.Ct. 755, 96 L.ed. 1344, (1952), Justice Frankfurter, in his dissent, noted that the "need for soundness in the result outweighs the need for speed in reaching it". At p. 938. In *Aaron v. Cooper,* 357 U.S. 566, 78 S.Ct. 1189, 2d L.ed. 2d 1544, (1958), the Court agreed with Justice Frankfurter's statement in Youngstown, and noted that absent sufficient public importance, time elements cannot justify a grant of certiorari prior to Court of Appeals judgment. At. p. 567.

POINT TWO

The questions presented in the instant case have been answered by this Court and federal courts generally for many years, especially since the decision in *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.ed. 266, modified 336 U.S. 942 69 S.Ct. 877, 93 L.ed. 1099 (1948). In that case it was held that Rule 60(b)(6) of the Federal Rules of Civil Procedure was "broad enough" to set aside a default judgment and grant a fair hearing. In a subsequent case, it was held that relief may be accorded under Rule 60(b)(6) only in an "extraordinary situation". *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209 95 L.ed. 207, (1950). Again, in *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.ed. 2d 734, rehearing denied 371 U.S. 873, 83 S.Ct. 115, 9 L.ed. 2d 112 (1962), this Court stated that Rule 60(b) provides a corrective remedy for reopening of cases where alleged failures of plaintiff's attorney to act caused detriment to the plaintiff's right to a fair hearing. At p. 632.

The Circuit Courts of Appeal, in reviewing District Court decisions, uniformly and routinely hold that where a plaintiff in a civil case is prevented from presenting the merits of his case, relief from an adverse judgment is appropriate under Rule 60(b).

More specifically, Rule 60(b)(6) has been held to be available to grant relief to a petitioner who claims that ineffectiveness, negligence or misrepresentation of counsel deprived him of his right to present the full merits of his case. The following cases are cited as examples of the foregoing in civil cases and demonstrate that no conflict over the issue or standards to be applied exists: *U.S. v. Ciriani*, 535 F.2d 736 (2d Cir.,

1976); *Wilson v. Fenton*, 684 F.2d 249 (3d Cir., 1982); *Boughner v. Secretary of H.E.W.*, 572 F.2d 976 (3d Cir., 1978); *Hensley v. Chesapeake and Ohio R.R. Co.*, 651 F.2d 226 (4th Cir., 1981); *U.S. v. Flores*, 507 F.2d 59 (5th Cir., 1975); *Ervin v. Wilkinson*, 701 F.2d 59 (7th Cir., 1983); *Inryco v. Metropolitan Engineering Co., Inc.*, 708 F.2d 1225 (7th Cir., 1983); *Horace v. St. Louis Southwestern R.R. Co.*, 489 F.2d 632 (8th Cir., 1974); *McKinney v. Boyle*, 404 F.2d 632, cert. denied 394 U.S. 992, 89 S.Ct. 1481, 22 L.ed. 2d 767, reh. denied 395 U.S. 941, 89 S.Ct. 2003, 23 L.ed. 2d 459 (1969); *L.P. Steuart v. Matthews*, 329 F.2d 234, cert. denied 379 U.S. 824, 85 S.Ct. 50, 13 L.ed. 2d 35 (1964); *Transport Pool Division of Container Leasing, Inc. v. Joe Jones Trucking Co.*, 319 F.Supp. (DC Ga., 1970); *U.S. v. Manos*, 56 FRD 655 (SD Ohio, 1972); *Brooks v. Walker*, 82 F.R.D. 95 (DC Mass., 1979).

The underlying rationale for the exercise of discretion in the above listed cases is that justice demands that the plaintiff in civil cases has a right to procedural and substantive due process in the form of a fair hearing, including full presentation on the merits.

The District Court had jurisdiction to hear and decide petitioner's Rule 60(b)(6) motion, and did so. Petitioner had the opportunity to make a showing that ineffective counsel prejudiced her rights at trial. She points to no facts, nor does she claim abuse of discretion in the District Judge's denial of her motion.

CONCLUSION

It is respectfully submitted that petitioner has failed to sustain its burden under Rule 18 of establishing that this case involves issues of imperative public importance requiring immediate settlement in this Court, therefore, the writ should not be granted. Moreoever, there is ample case law demonstrating that District Courts and Circuit Courts of Appeal routinely hear and uniformly hold that, where circumstances warrant, relief from a judgment under Rule 60(b)(6) is available to a plaintiff in a civil case who alleges and demonstrates, denial of the right to a fair hearing due to ineffective counsel.

The petition should be denied.

Respectfully submitted,

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